IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, and CHARLES RIDLEY, et al., Plaintiff-Intervenor, v. STATE OF GEORGIA *et al.,* (DUBLIN CITY SCHOOL DISTRICT) Defendants.	)	Civil Action No. 3009

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO ENFORCE ORDERS OF JULY 16, 1971 AND MAY 19, 1978, FOR ISSUANCE OF RULE TO SHOW CAUSE, AND FOR FURTHER RELIEF

The United States submits this memorandum of law in support of its motion to enforce the Orders of July 16, 1971 and May 19, 1978, for issuance of a rule to show cause why the Dublin City School District ("Dublin") should not be held in contempt for its willful and repeated violations of the May 19, 1978 Order, and for further relief against the Laurens County School Board ("Laurens") to halt its interference with the July 16, 1971 Order.

BACKGROUND

This desegregation case involving Dublin is one of the Ridley cases, United States & Ridley v. State of Georgia, C.A. No. 12,972 (N.D. Ga.), that remains on the Court's active docket. Dublin has approximately 3,174 students and a student body that is 72% black and 24% white. See Tab 1 at 1. As of this year, Dublin operates five schools with a consolidated grade

structure: Susie Dasher Elementary (K-1), Saxon Heights Elementary (2-3), Moore Street Elementary (4-5), Dublin Middle School (6-8), and Dublin High School (9-12). Dublin remains subject to, inter alia, the Orders of December 17, 1969 ("1969 Order"), July 16, 1971 ("1971 Order"), see Tab 2, and May 19, 1978 ("1978 Order"), see Tab 3, as well as other federal law that governs its desegregation obligations. Pursuant to the Order of February 14, 1974 ("1974 Order"), Dublin must file bi-annual reports with the Georgia State Board of Education and the former United States Department of Health, Education, and Welfare ("HEW"), which has been replaced by the Department of Education. See 1974 Order at 7 (attachments omitted) (Tab 4).[1]

As this memorandum explains, Dublin's reports show that transfers from Dublin to Laurens have been violating the 1971 Order. The United States seeks an order enforcing the 1971 Order against Dublin and enjoining it from transferring records for students whose transfers violate the Order. Because relief against Dublin alone will not achieve compliance with the 1971 Order, the United States also seeks further relief in the form of an order enjoining Laurens from accepting transfers that violate the 1971 Order and requiring Laurens to conduct residency verification so that Dublin residents cannot flout the Order by falsely claiming residence in Laurens's school attendance zone. The United States also seeks to enforce the 1978 Order against Dublin because its classroom data show repeated violations. The United States through its Departments of Education and Justice has attempted to obtain Dublin's voluntary compliance with the 1978 Order over a ten-year period and now moves this Court to order Dublin to show

[1] To reduce the bulk of the tabs, the United States has not submitted every page of every document, but has included all pages cited herein. See Tabs 4 and 14 (excluding attachments), Tab 17 (selected pages of orders), Tab 20 (selected pages of K to 8 classes), Tab 21 (excluding certain attachments), Tab 22 (excluding attachment), Tab 23 (excluding attachments), and Tab 25 (excluding pages 2-4, 6-7, 9-24). These pages can be submitted if the Court desires them.

cause why it should not be held in contempt for its long standing violations. The relief requested is appropriate because full good faith compliance with all of the Court's orders is imperative in desegregation cases. See Missouri v. Jenkins, 515 U.S. 70, 89 (1995); Freeman v. Pitts, 503 U. S. 467, 491-92, 498 (1992); Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249-50 (1991); NAACP, Jacksonville Branch v. Duval County Sch. Bd., 273 F.3d 960, 966 (11th Cir. 2001) (citing Jenkins, 515 U.S. at 88, and quoting Freeman, 503 U.S. at 492).

I. PROCEDURAL HISTORY

On August 1, 1969, the United States filed suit against the State of Georgia and various school agencies and officials of the state alleging that the defendants were operating dual school systems based on race in violation of the Fourteenth Amendment and federal law. United States v. State of Georgia, C.A. No. 12,972 (N.D. Ga.). The suit was filed in the United States District Court for the Northern District of Georgia, and that Court issued several orders to desegregate 81 school districts in Georgia. Pursuant to the 1969 Order, Dublin submitted its first desegregation plan, which was approved on April 21, 1970. On July 16, 1971, that Court issued an order amending its earlier order in several areas including inter-district transfers and requiring the Ridley districts to submit new desegregation plans for the 1971-72 school year. The inter-district transfer clause of the 1971 Order is discussed in detail below.

On December 27, 1971, that Court ordered Dublin to develop a new plan that would bring Dublin into compliance with the student assignment provisions of earlier orders. On February 22, 1972, that Court approved a new student assignment plan. On September 5, 1972, pursuant to the directions of the United States Court of Appeals for the Fifth Circuit, that Court entered an order which, inter alia, added each individual school district as a party defendant and

transferred to this Court jurisdiction over Dublin among other school districts. On December 27, 1973, the State defendants moved the Court to dismiss the State defendants, or in the alternative, to place on the inactive docket the school districts that "by virtue of compliance with all court orders have achieved and maintained a 'unitary status.'" Jan. 24, 1974 Order at 2. In its Order of January 24, 1974, the Court placed many school districts on the inactive docket, dissolved its prior orders with respect to the inactive districts, and issued a permanent injunction against them. The Court placed additional districts on the inactive docket in its Order of February 14, 1974, but expressly kept Dublin on the active docket. See 1974 Order at 6 (Tab 4). The Court ordered districts remaining on the active docket to "continue to comply with all of the requirements of the December 17, 1969 Order . . . , as subsequently, modified, with [certain] exceptions," none of which pertained to inter-district transfers. Id. at 7 (Tab 4).

On January 22, 1976, counsel for Dublin requested that Dublin be placed on the inactive docket. See Docket Sheet Entry. The Court indicated that it would do so if Dublin was in compliance with the Orders. See id. The United States began reviewing Dublin's compliance and found that from the 1973-1974 school year through the 1976-1977 school year, Dublin was assigning students to classes on the basis of achievement tests and that this practice "ha[d] resulted in extensive classroom segregation" at two elementary schools and the junior high school, "the over representation of black students in the lower [level] sections," and in majority white high level sections at two of the three majority black schools. 1978 Order at 2 (Tab 3). On May 19, 1978, the Court approved a Consent Order that requires Dublin to "eliminate classroom segregation in the elementary schools and in non-elective courses taught in the junior high school" and to "assign students to classes on the basis of any racially neutral method it considers

educationally sound so that each section shall be composed of from 50% to 150% of the minority student quotient for that grade level." Id. at 3. As is true for all of the Ridley orders, "minority" means "the race, black or white, which constitutes less than half of the total pupil enrollment, in any school district for any one regular school year, but shall not apply to any summer school or adult or special education courses afforded by the various school districts." 1969 Order at 3. Since that time, the Court has not issued any further orders regarding Dublin; thus, Dublin remains on the active docket and subject to the 1969, 1971, 1974, and 1978 Orders among others.

II. Dublin's Violations of the 1971 Order

The 1971 Order added the following inter-district transfer clause to the 1969 Order:

> Transfers to students in one district for attendance at public schools in another district shall be granted only on a non-discriminatory basis. In no event, shall more than 5% of the minority students be allowed to transfer to other districts where they are either in the majority or made a part of a larger minority percentage than in the district from which they have transferred, excluding those instances where all students of both races in a certain category are transferred by contract approved by the State School Board.

1971 Order at 3, § I(3) (Tab 2). The Appendix of the Order defines "minority race" with the same language quoted above from the 1969 Order. See Appendix to 1971 Order at 1, ¶ I (Tab 2). The Order further requires the State of Georgia to "monitor this provision" by "obtain[ing] the number of inter-district transfers in its reports." 1971 Order at 3 n. 3A (Tab 2). Dublin reports the number of inter-district transfers by race and by sending and receiving school districts in its reports, but the transfer violations in its 2003, 2002, and 2001 reports were not self-evident because Dublin reported the enrollment of black, rather than white, students where the form calls for the "Numerical Minority Enrollment" and "Minority Quotient" even though the form and the Ridley Orders make clear that "minority" means the numerical minority race, be it black or

white. See Reports of FY03, June 11, 2002, and Oct. 29, 2001 (Tab 5 at 1-3).

When the 1971 Order went into effect, black students were the numerical minority in Dublin because its student enrollment was approximately 43% black and 57% white. See Tab 6 at 4 for 1970-71 enrollment. While Dublin was a minority black district in 1971, the Court applied the transfer clause to school districts throughout Georgia whose percentages of black and white students varied widely. See Tab 2. The 5% limit applied to all such districts because its goal was to prevent transfers that would make the existing minority in a given district even more of one, thereby rendering schools racially identifiable and impeding desegregation. Compliance with the limit was essential, and the Court kept on the active docket districts whose reports showed that they were "either sending or receiving nonresident students in excess of [the] five (5) percent [limit]" and subjected them to "[f]urther special orders." Jan. 24, 1974 Order at 9-10. Although Dublin has changed from a minority black to a minority white district, the Order continues to serve the goals of desegregation by prohibiting more than 5% of Dublin's decreasing white population from transferring to majority white school districts.

Dublin's reports for the past seven years show that it has violated the 1971 Order by allowing substantial numbers of white students to transfer to the Laurens County School District, which is 65% white, in excess of the 5% limit. See Tabs 5 and 7. According to Dublin's reports, the numbers of transfers to Laurens that have violated the Order are approximately as follows: 108 in the 1997-98 school year; 205 in the 1998-99 year; 239 in the 1999-2000 year; 260 in the 2000-2001 year; 287 in the 2001-02 year; 107 in the 2002-03 year; and 113 in the 2003-04 year. See Tab 7. Data provided by Dublin to the United States show that its PK-12 white enrollment has fallen during those years from 1,385 students in March 1997 to 763 in November 2003, and

its total enrollment has changed from 36% white to 24% white. See Tab 8 at 1.

The negative effect of the violative transfers to Laurens has been particularly acute in Dublin's elementary schools. Moore Street Elementary was 29% white in the 1996-97 year and only 9% white in 2002, and Saxon Elementary was 27% white in the 1996-97 year and only 11% white in 2002. See Nov. 13, 1996 Report (Tab 5 at 11, 13); Tab 20 at 21, 25. This school year, Dublin implemented a single grade configuration for grades K to 5, but the percentages of white students per grade remain low (K = 15%, 1 = 22%, 2 = 17%, 3 = 19%, 4 = 15%, 5 = 18%), and are far lower than they were in the 1996-97 year (K=27%, 1=24%, 2=30%, 3=30%, 4=36%, 5 =35%). See Tab 8 at 1. Most of the loss has been in grades K to 8, where the number of whites has dropped by more than half from 853 to 422 between the 1996-97 year and the 2003-04 year, see id., and Dublin has used racially segregative class assignment practices in these grades at least in part to stop whites from leaving as explained below. For these reasons, the United States urges this Court to enforce its Order by allowing only high school transfers from Dublin to majority white districts such as Laurens up to the 5% limit and by prohibiting elementary and middle school transfers from Dublin to such districts at least until such time as white enrollment in those schools increases to levels comparable to that of the high school, which is 34% white. Enforcing the Order in this manner will be easier for Dublin to implement and for the Court and the United States to monitor than a lottery system for all grades, and the number of reported white high school transfers to Laurens this year (37) was equal to the 5% limit. See Tab 7 (5% limit equals 37) and Letter of Nov. 6, 2003, at 3 (reporting 37 high school transfers) (Tab 9).

Dublin has violated the Order because it has taken no steps to stop the transfers, such as seeking the help of this Court or the State of Georgia, which is required to monitor such

transfers. See 1971 Order at 3 n. 3A (Tab 2). Dublin also has facilitated the violative transfers by sending hundreds of student records to Laurens over the past several years. Although Georgia law requires school districts to transfer records upon request from a public and private school, see Rule160-5-1-.14(2)(a), Dublin should not have transferred them to Laurens because federal court orders take precedence over state law. See U.S. Const. art. VI, cl. 2.

In response to the United States' concerns about the violations, Dublin indicated that it "would agree to an Order requiring it not to comply with state law and, instead, prohibiting it from sending records of students residing within the Dublin City School District to the Laurens County School District or any private school." Letter of Nov. 24, 2003, at 2 (Tab 10 at 2). The United States therefore seeks an order prohibiting Dublin from transferring records to only public schools for students whose transfers exceed the Order's 5% limit. See Valley v. Rapides, 646 F.2d 925, 944 (5th Cir. 1981) (court may order districts to withhold student's records from public schools but not private schools).[2] Dublin also has indicated that it currently grants and intends to continue granting parents' requests for copies of their children's records, see Tab 10 at 2, and Laurens's counsel has represented that Laurens accepts copies of records when enrolling transfers. Thus, while the United States asks this Court to order Dublin to comply with the Order's 5% limit by allowing only high school transfers and to enjoin Dublin from sending records to public school districts for students whose transfers exceed the limit, such an order will provide an incomplete remedy because Laurens can accept transfers without Dublin's consent under Georgia law, see Ga. Code § 20-2-293(a), and Laurens will accept copies of records from

[2] Cases decided by the Fifth Circuit prior to October 1, 1981 are binding precedent in the Eleventh Circuit. See Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

the parents/guardians of transfer students.

III. Laurens County's Refusal to Respect the Court's 1971 Order

Laurens is not a Ridley district because it entered into a voluntary HEW desegregation plan, but the transfers that Laurens has been accepting from Dublin contravene the Order by permitting more than 5% of Dublin's white resident students to transfer to a majority white public school district. On August 6, 2003, the United States sent a letter to Laurens informing it that the number of white students it had accepted from Dublin each year since 1996 had far exceeded the number permitted by the 1971 Order and were impeding desegregation in Dublin. See Tab 11 at 1. The United States asked Laurens what steps it was willing to take "to render the number of transfers consistent with the court's order." Id. Since then the United States has unsuccessfully attempted to resolve this matter with Laurens by exploring whether Laurens would deny transfers that violate the order, conduct verification of students' residences, and report to the United States regarding the transfers it accepts and denies. See Letter of Mar. 10, 2004, at 1-2 (Tab 12). Laurens did not provide its formal written response to the United States until March 12, 2004, and refused to take any steps other than maintaining its current tuition policy, see Tab 13, which to date has not engendered compliance with the Order.[3]

According to the data reported by Laurens, 150 white students transferred from Laurens to Dublin this school year. See Letter of Nov. 6, 2003 at 3 (Tab 9 at 3). This number is the same as the one reported by Dublin in the 2002-03 year and 183 students lower than the 333 white

[3] In its March 12 letter, Laurens notes that more than twice as many students transferred from Laurens to Dublin. See Tab 13. While it is true that approximately 369 Laurens residents transferred to Dublin this year (185 black, 173 white, and 11 other), see Tab 10 at 4, the 1971 Order does not prohibit transfers into Dublin, and the United States does not seek to enjoin them because they are having a positive effect on white enrollment in all of the receiving schools.

transfers students who were reported in the 2001-02 year. See Tab 7. Laurens attributed the decrease in the number of transfers to its tuition policy in the 2002-03 and 2003-04 years. See Letter of Dec. 2, 2003 (Tab 14 at 4). Last year, tuition was $992.00 per child; this year, it is only $300 per family. See id. at 4-5. Although the reported number is lower this year, it continues to violate the Order for it exceeds the 5% limit by approximately 113 students. See Tab 7.

The United States examined data submitted by Dublin, the Georgia State Department of Education, and a private school near Dublin to locate the approximately 180 white Dublin resident students who no longer are reported as transfers to Laurens. The students do not appear to have returned to Dublin in any significant numbers because the numbers of white students in grades K-8 (422) and PK-12 (763) this year have barely changed from the numbers that existed in the 2001-02 year (K-8 = 407 and PK-12 = 743) when 333 whites transferred to Laurens. See Tab 8 at 1. The private school and home school data show that the number of Dublin residents in such schools has changed little since 1997 and has actually decreased since the 2001-02 year. See Tab 15. Data from Dublin's reports and the Georgia Department of Education regarding transfers of Dublin residents to the surrounding school districts of Bleckley County, Dodge County, Johnson County, Telfair County, Treutlen County, Twiggs County, Wheeler County, and Wilkinson County show that only 6 Dublin residents transferred to Johnson County this year, see Tab 16 at 3, and that none transferred to these eight districts between 1995 and 2003. See Tab 5 at 1-8, 17. Because the number of white Dublin residents transferring to Laurens has dropped by roughly 180 students in the past two years and the vast majority of these students do not appear to have enrolled in nearby schools, the United States suspects that Dublin residents are falsely claiming residence in the Laurens school district zone and thereby flouting the 1971 Order.

IV. Laurens Must Be Enjoined from Further Interference with the 1971 Order

Given Laurens's knowing interference with the 1971 Order, the United States respectfully asks this Court to issue an injunction enjoining Laurens from accepting transfers that violate the 1971 Order and requiring Laurens to verify students' residences so that Dublin residents cannot defy the Order by falsely claiming residence in Laurens's school attendance zone. Even if this Court enjoins Dublin from transferring records to Laurens, Laurens can and will continue to accept transfers that violate the Order and will continue to accept copies of records when enrolling transfers. Thus, the only way to halt the substantial and repeated violations of the Order and to achieve compliance therewith is to issue the requested injunction against Laurens.

This Court has a strong interest in ensuring that its orders are not defied, and it has the power to issue the requested injunction against Laurens even though it is not a party to the Dublin case. See 28 U.S.C. § 1651(a) ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); United States v. New York Tel. Co., 434 U.S. 159, 174 (1977) ("The power conferred by [28 U.S.C. § 1651(a)] extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice . . . ."); Rapides, 646 F.2d at 943 (holding that the court "had broad power under the All Writs Act, 28 U.S.C. § 1651 to enjoin third parties, including state courts, from interfering with its desegregation orders"); Bullock v. United States, 265 F.2d 683, 691 (6th Cir. 1959) (holding lower court had jurisdiction to enjoin private individuals from interfering with desegregation order under All Writs Act); United States v. State of Texas, 356 F. Supp. 469, 471 (E.D. Tex.

1972) (enjoining state court from interfering with transfer provision of desegregation order under All Writs Act). In Rapides, the district court went so far as to enjoin the State of Louisiana, the state police, and "all persons with notice of this order" from "interfering with" two of its desegregation orders, and the Fifth Circuit upheld the district court's injunction under the All Writs Act. Id. at 935, 943-44. As was true in Rapides, Bullock, and State of Texas, full enforcement of a federal desegregation order will not be possible unless this Court enjoins a non-party from interfering with it.

Alternatively, this Court may issue the requested injunction against Laurens pursuant to its inherent authority to preserve its power to make a binding judgment because Laurens's interference with the 1971 Order has thwarted the attainment of the relief provided by the Order. See United States v. Hall, 472 F.2d 261, 265 (5th Cir. 1972) (court had "fundamental power to make a binding adjudication between parties properly before it" by enjoining non-parties from interfering with desegregation order and by holding non-party in contempt for violating that injunction); see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 693 (1979) (recognizing "the rule [in Hall] that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined").

> As this Court is well aware, school desegregation orders often strongly excite community passions. School orders are, like in rem orders, particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties. In such cases, . . . courts must have the power to issue orders . . . tailored to the exigencies of the situation and directed to protecting the court's judgment. The peculiar problems posed by school cases have required courts to exercise broad and flexible remedial powers.

Hall, 472 at 266; see also Cooper v. Aaron, 358 U.S. 1 (holding that governor and state legislature had duty to obey federal desegregation order against school district). This Court

therefore has the power to issue the requested injunctive relief against Laurens.[4]

Part of the injunctive relief requested by the United States and within this Court's power to grant includes requiring Laurens to verify student residences so that Dublin residents cannot flout the 1971 Order and full compliance can be enforced. As explained above, the United States has a reasonable basis for believing that Dublin residents have falsely claimed residence in Laurens during the past two school years and are likely to do so this coming year if Laurens is ordered to deny transfers exceeding the 5% limit of the 1971 Order. According to the representations of Laurens's counsel, Laurens requires only that parents provide an address that is within Laurens's school district zone. See Tab 12 at 1. This minimal residency requirement is woefully inadequate to stop Dublin residents from flouting the Order, and this Court has the power to order the residency verification needed to achieve compliance with its Order. See Rapides, 646 F.2d at 942 ("a federal district court's desegregation order will bind the children affected, their parents, and state and local officials"); Board of Educ. of Indep. Sch. Dist. 89, Oklahoma County v. York 429 F.2d 66, 69-70 (10th Cir. 1970) (order requiring parents to send their son to certain school in district "was 'necessary and appropriate' in the aid of the court's jurisdiction over the underlying segregation problems" and valid under All Writs Act).

---

[4] This Court also has the power to issue the requested injunction pursuant to Federal Rule of Civil Procedure 65(d), which provides that every order granting an injunction binds not only the parties to the action, but "those persons in active concert or participation with them" as well, provided such persons "receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). The United States notified Laurens of the Order and the fact that its acceptance of transfers from Dublin had been interfering with the Order. See Tab 11. By continuing to enroll students from Dublin whose transfers violate the Order and to request their records from Dublin, Laurens has been "in active concert or participation" with Dublin in perpetuating violations of the Order. See Hall, 472 F.2d at 267 (interpreting Rule 65(d) as codifying rather than limiting court's inherent power to protect its ability to render a binding judgment and affirming contempt finding against non-party under Rule 65(d)).

Residency verification procedures, such as those required in many other school desegregation cases, provide the only means of ensuring that Dublin residents do not defy the Order by feigning residence in Laurens. See, e.g., Sept. 10, 1999 Consent Decree in Lee v. Pike County Bd. of Educ. at 22-28; Agreed Modifications to 1991 Consent Order in United States v. West Carroll Parish Sch. Bd. at 2-6, 14-16 (Tab 17 at 4-10, 12-21). These procedures generally require completion of a residency form, supporting documentation, and home visits for non-parent caretakers and in response to complaints alleging a false residence. The United States seeks an order from this Court requiring Laurens to apply these procedures to at least: (1) all students enrolling in Laurens for the first time, including but not limited to all Kindergarten students; (2) any student who was ever a transfer student from Dublin; and (3) any student who ever resided in the Dublin school district zone. A proposed order to this effect, including residency verification procedures set forth in Attachment A, is attached with this motion.

V. Dublin's Willful and Repeated Violations of the 1978 Order

Dublin has willfully and repeatedly violated the 1978 Order. The United States has attempted to obtain compliance for ten years without resorting to the Court, but now asks this Court to enforce the Order and to order Dublin to show cause why it should not be held in contempt for its violations.

A. The Basis for the 1978 Order

In 1977, the United States determined that from the 1973-1974 school year through the 1976-1977 school year, Dublin was assigning students to classes on the basis of their scores on the Iowa Test of Basic Skills. The United States notified Dublin that the use of achievement tests for class assignments had resulted in extensive classroom segregation at two elementary schools

and the junior high school, in the over representation of black students in the lower level sections, and in majority white high level sections at two of the three majority black schools. See Tab 3 at 2; Letter of Jan. 4, 1978, at 1 (Tab 18 at 1). Because Dublin had yet to be declared unitary or to have assigned students to classes without achievement tests since the 1972 plan, pursuant to McNeal v. Tate County, 508 F.2d 1017, 1020 (5th Cir. 1975), the United States informed Dublin that it should eliminate classroom segregation resulting from the use of achievement tests and use a racially neutral assignment method. See Tab 18 at 2-3.

In McNeal, the Fifth Circuit established a "rule" requiring courts to review a student assignment plan that results in racial segregation "with a punctilious care, to see that it does not result in perpetuating the effects of past discrimination." Id. The Fifth Circuit held that:

> Ability grouping, like any other non-racial method of student assignment, is not constitutionally forbidden. . . . Such districts ought to be, and are, free to use such grouping whenever it does not have a racially discriminatory effect. If it does cause segregation, whether in the classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system if the school district can demonstrate that [1] its assignment method is not based on the present results of past segregation or [2] will remedy such results through better educational opportunities.

Id. In McNeal, the district used a class assignment plan for its elementary and junior high schools that was based on "faculty-predicted ability grouping" and resulted in one to four all black sections in every elementary grade and a few all white sections in the higher grades. Id. at 1018. The plaintiffs sought to hold the district in contempt because its desegregation order forbid segregated classrooms, just as here the 1978 Order does. Because the district's ability grouping resulted in "substantial racial segregation in its classrooms," the Fifth Circuit held that it had to make the first or second showing numbered above, and if it could not do so, it had to

devise an assignment plan "not based on race or ability grouping." Id at 1021 (emphasis added). The Fifth Circuit elaborated by holding that when a district "cannot substantiate its present [ability grouping] system, it may choose any racially neutral method of classroom assignment it considers educationally sound" and "[t]hat method should be approved by the district court unless its effect is racial segregation or is substantially adverse to the quality of education available to some of the district's children." Id. at 1021 (emphasis added).[5]

Because the United States determined that Dublin's grouping practices created segregated classes in violation of Dublin's desegregation obligations, it drafted a consent order that included the exact language underlined above. On May 19, 1978, this Court approved the order finding that "[it] will satisfy the requirements of federal law." 1978 Order at 2 (Tab 3). The 1978 Order requires Dublin to "eliminate classroom segregation in the elementary schools and in non-elective courses taught in the junior high school" and to "assign students to classes on the basis of any racially neutral method it considers educationally sound so that each section shall be composed of from 50% to 150% of the minority student quotient for that grade level." Id. at 3, ¶ 1. [A grade 6-8 middle school has replaced the grade 7-8 junior high school.] Thus, the 1978 Order requires that Dublin's K-8 assignment method (1) eliminate classroom segregation, (2) be racially neutral and educationally sound, and (3) create classes that fall between 50% to 150% of

[5] The Eleventh Circuit is bound by McNeal and has expressly quoted its holding. See Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1414 (11th Cir.1985) (quoting McNeal, 508 F.2d at 1020 and holding that ability grouping "resulting [in] numerical racial disproportionality . . . is permissible in a school district that has not been declared fully unitary 'if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.'"); Jacksonville Branch, NAACP v. Duval County Sch. Bd., 883 F.2d 945, 953 (11th Cir. 1989) (same).

the numerical minority quotient for that grade level. The last requirement means that "if the fourth grade of a particular school was 40% black, each section or class must enroll a student population from 20% - 60% black." Letter of Mar. 15, 1978, at 1 (Tab 18 at 4).

In 1978, blacks were the minority in some grades and whites were the minority in others such that some classes had to fall within a certain range of black enrollment (e.g., Moore Street's 5th grade classes had to be 9% to 27% black) and others had to fall within a certain range of white enrollment (e.g., Saxon Height's 1st grade classes had to be 9% to 29% white). See 1978 Report (Tab 3 at 8, 9). The result, however, was the same: classes could no longer be single race or racially identifiable regardless of what assignment method Dublin used. Today, whites are in the numerical minority in all grades, but the principle underlying the 1978 Order remains the same: classes must fall within a certain range of the minority enrollment for that grade so that classes are no longer single race or racially identifiable. For example, 7th grade is 29.5% white this year, see Tab 1 at 1, which means classes in this grade must be between 14.75% and 44.25% white (i.e., 14% to 44% white). Thus, the Order still serves the goals it was intended to serve despite the fact that Dublin has changed from a minority black district to a minority white district. Moreover, Dublin's persistence in creating single race and otherwise racially identifiable classes despite its clear obligations to the contrary shows that the 1978 Order remains necessary.

B. Dublin's Violations and the United States' Efforts to Obtain Compliance

In 1990, the Department of Education's Office for Civil Rights ("OCR") received a complaint regarding, inter alia, Dublin's ability grouping and regular class assignment practices. OCR determined that Dublin's elementary and middle school classes contravened the terms of the 1978 Order, and Dublin signed a compliance agreement on June 30, 1994. See Tab 19 at 1.

Despite repeated assurances to OCR each year that it would comply, Dublin failed to take steps to comply with the Order. See id. at 2-22. In October 2001, the Justice Department began requesting data from Dublin to assess its compliance with its desegregation obligations, including the 1978 Order.

The Justice Department determined that homerooms, non-ability grouped classes, and ability grouped classes at the elementary and middle schools in the 2001-02 and 2002-03 school years were inconsistent with the Order's prohibition on "classroom segregation" and its 50% to 150% rule. See 2002-03 and 2001-02 data from certain K through 8 classes showing single race classes and other violations (Tab 20 at 1-25). Dublin's class assignment data for the 2003-04 year also show indisputably that Dublin has not eliminated classroom segregation as the 1978 Order requires and that the majority of its classes do not fall within 50% to 150% of the minority quotient for that grade level. See Tab 10 at 6-32.[6] In fact, many classes have only black students, while others have majority white enrollments, ranging from 51% to 84% white, in violation of the Order. See id. In short, the classes resemble those that necessitated the 1978 Order.

The United States' ongoing review of the assignment methods as well as students' grades, teacher recommendations, and ability grouped classes also has exposed that the assignments at a minimum for this year and last year were neither racially neutral nor educationally sound as the

[6] For example, in 6th grade, 6 of the 9 ability grouped science classes violated the Order's 50% to 150% rule. See Tab 10 at 6. Two classes had no whites while another two had 15 and 17 whites. Id. The three that complied with the rule had 8 to 10 whites. Id. Likewise, 6 of the 10 ability grouped math classes violated the Order's rule. Id. at 7. One had no whites while another had 16. Id. Even the purportedly non-grouped classes violated the rule despite the fact that the number of white students was sufficiently high to have had all the classes comply with the Order. For example, 6 of the 9 language arts classes and 5 of the 12 social studies classes in 6th grade violated the Order, when all of them could have had 6 to 7 whites and have complied with the Order. Id. at 6-7. Instead, some classes had 1 to 0 whites, while others had 15 to 17 whites. Id

Order mandates. Last year, the former middle school principal, now deceased, controlled the class assignment process and that process relied "solely on teacher recommendation forms . . . and principal discretion." Tab 21 at 1. Dublin conceded that the process "resulted in some disparities both in terms of race and academic performance." Id. at 2. The 2002-03 and 2001-02 data show that the principal's process racially segregated students by assigning only black students to 3 of the 9 homerooms per grade so that the middle school had 9 single race homerooms. See Tab 20 at 2-3, 10-11. To have had this degree of classroom segregation in a 30% white school is indefensible. For example, sixth grade was 27% white last year, and each homeroom could have complied with the Order's 50% to 150% rule if its enrollment had been between 13.5% to 40.5% white (i.e., 13% to 41% white). Instead, the principal created 3 "low" homeroom classes that were 0% white and four "high"ones that were 44% to 73% white. See id. As a result, 7 of the 9 homerooms in 6th grade were incongruous with the Order. The situation was essentially the same for the 7th and 8th grade classes. See id. and Attachment A (Tab 21).

The principal assigned every student in the 2002-03 year to a high or low homeroom, and students remained grouped at that level all day long, "with very few exceptions," regardless of whether a student's ability level varied across subjects. Tab 21 at 2. For example, if a student received a low teacher recommendation in three of the five core subjects, the principal assigned the student to low classes in all five subjects even if he was recommended for the high level in the other two subjects. See id. This ability grouping method was not only educationally unsound, but it was also explicitly race-based to the extent that it created all black low classes and all black high classes when these black students could have been placed in the other racially mixed high or low classes. The assignment method also created majority white high classes.

In April 2003, Dublin submitted a plan for assigning middle school students to OCR and the Justice Department. See Plan with Attachment A only (Tab 21). During the summer of 2003, the United States examined the plan in detail and determined that it was unacceptable because it would not achieve compliance with the Order. On August 5, 2003, the United States rejected the proposal and proposed a new consent order to address the violations of the Order and its concerns about segregative grouping practices. See Letter of Aug. 5, 2003 (Tab 22). Dublin rejected the proposed consent order on November 24, 2003, and made a counterproposal. See Tab 10 at 1-3. On April 9, 2004, the United States rejected the counterproposal because it would continue to violate the Order and to use heterogeneous and ability grouping assignment methods that would create segregated classes, and because it was disingenuous, as explained below.

Since April 2003, Dublin repeatedly has represented to the United States both in writing and orally that it was ability grouping only two of the four core subjects per grade this year. See, e.g., Tab 21 at 5; Tab 23 at 2-3; Tab 10 at 2. Dublin claimed it was grouping only science and math in 6th grade, and only language arts and math in the 7th and 8th grades. See Tab 21 at 5; Tab 23 at 2-3. Further it claimed there were pedagogical reasons for grouping the two subjects in each grade, but it made no case for grouping any other subjects in those grades. See Tab 21 at 6-7. The 1978 Order makes no exception for ability grouped classes.[7] The United States rejected

[7] The 1978 Order applies to all classes except special education classes. See 1969 Order at 3; Appendix to 1971 Order at 1, ¶ I (Tab 2). To avoid conflicts with federal law governing Title I programs and state law governing Early Intervention (EIP) and gifted classes, the United States is willing to exempt self-contained and pull-out Title I, EIP, and gifted math classes from any order that the Court issues to enforce the 1978 Order provided such classes are implemented in good faith. In its November 24 letter, Dublin expressed concern about being able to comply with the Order and the No Child Left Behind Act. See Tab 10 at 1-2. When asked to explain, Dublin stated that a "fast track" class of black fifth and sixth grade students who are two-years behind grade level would violate the Order. The United States is willing to exempt the fast track

the proposal to group two subjects per grade because Dublin conceded that the grouped classes and heterogeneous classes would violate the Order, see Tab 22 at 1, and discussions with Dublin made clear that only one core subject could be grouped under the team approach if the other core subjects were to be heterogeneous. See id. at 2. Although Dublin claims to have ability grouped only two of the four core subjects in each grade this year, its class rosters show that students assigned to a given level of grouped math remain at that level for the second core subject as well as the third with very few exceptions, and that about one third of the seventh grade students stay grouped at the same level for all four core subjects. See Tab 24.[8] Thus, this year's data show that grouping two subjects per grade extends racial segregation well beyond the two grouped classes. See Tab 10 at 6-32; Tab 24. While there is no justification for ability grouped classes that violate the Order, there is even less justification for heterogeneous classes that do.

The United States offered a proposed consent order that would have permitted Dublin to continue ability grouping one subject per grade (middle school math and elementary reading) even if the classes did not meet the 50% to 150% rule provided the grouping was done in a racially neutral and educationally sound way that relied on multiple, uniform criteria relevant to math and reading ability. See Tab 22 at 2. Dublin rejected the proposal, implemented its own

---

class as well provided it is implemented in good faith. That said, when fast track, EIP, gifted, Title I, and special education students are in a regular class, they must be counted to determine if the regular class's enrollment complies with the Order's 50% to 150% rule.

[8] Because the class rosters contain identifying information for students, they are not submitted at this time but could be submitted later in redacted form or under a protective order. Although social studies was not to be grouped, see Tab 21 at 5 and Tab 23 at 3, and the team approach permitted integrated non-grouped social studies classes, Dublin grouped 9 of the 33 social studies classes and as a result, 39% (13 of 33) of them violated the Order. If these 9 classes had not been grouped, all of the 33 classes could have complied with the Order.

this year, and proposes to group two middle school subjects per grade again next year knowing full well that doing so will effectively group three and sometimes all four of the core subjects under the team-teaching approach and will keep students segregated in purportedly "non-grouped" subjects as well as "grouped" ones, as this year's data makes plain. See Tab 10 at 6-32. Dublin also proposed assigning white elementary students to classes until enrollment in the classes reaches but does not exceed 50% white. See id. at 2. The United States rejected this proposal because it will not comply with the Order and otherwise violates federal law by, inter alia, creating segregated classes and/or using race to determine class assignments.

C. This Court Should Enforce the 1978 Order and Issue a Rule to Show Cause

Given Dublin's repeated violations of the 1978 Order outlined above, Dublin must be enjoined from any future assignment practice that continues to violate the Order. Full good faith compliance with all of the Court's orders is essential. See Jenkins, 515 U.S. at 89; Freeman, 503 U. S. at 491-92, 498; Dowell, 498 U.S. at 249-50; Duval County, 273 F.3d at 966 (citing Jenkins, 515 U.S. at 88, and quoting Freeman, 503 U.S. at 492). The United States has spent a decade trying to persuade Dublin to comply with the 1978 Order and was even willing to jointly propose a new consent order to this Court that would have eliminated segregated classes with the possible exception of certain ability grouped middle school math and elementary reading classes provided the grouping was done in a racially neutral and educationally sound way. Dublin, however, rejected this reasonable alternative and will continue to fail to comply with this Court's Order. In light of Dublin's recalcitrance, the United States respectfully asks this Court to enforce the terms of its 1978 Order and to order Dublin to show cause why it should not be held in contempt for its willful and repeated violations of the Order.

In addition to the 1978 Order, other applicable federal law also demonstrates that it is unlawful to use race in a manner that segregates students in classrooms. It is well settled that a school district that is subject to a desegregation decree has a duty "to take all steps necessary to eliminate the vestiges of [its prior] unconstitutional de jure system," Freeman, 503 U.S. at 485, and to show that "any current [racial] imbalance is not traceable, in a proximate way, to the prior [dual system] violation." Id. at 494. To remove the vestiges of the prior dual system, a district must eliminate "not only segregated schools, but also segregated classes within the schools." Johnson v. Jackson Parish Sch. Bd., 423 F.2d 1055, 1056 (5th Cir. 1970). "It goes without citation that a school board may not direct or permit the segregation of students within the classrooms." Adams v. Rankin County Bd. of Educ., 485 F.2d 324, 327 (5th Cir. 1973). "[C]lassrooms which are segregated by race are proscribed regardless of the degree of overall schoolwide desegregation achieved." McNeal, 508 F.2d at 1019. A district also may not use ability grouping that is based on the present effects of past segregation or current segregative intent. See id. at 1020; Montgomery v. Starkville Mun. Separate School Dist. 854 F.2d 127, 130 (5th Cir. 1988).[9] Dublin's present proposal rests on the effects of its recent segregative assignment practices. The United States also believes that Dublin's past all-day grouping practices intentionally segregated students and that its insistence on grouping two subjects per grade this year and next year despite its knowledge that segregated grouped and purportedly non-

[9] See also United States v. Gadsen, 572 F.2d 1049 (5th Cir. 1978) (holding that ability grouping that resulted in whites in high sections and blacks in low violated McNeal and enjoining such grouping); Moses v. Washington Parish Sch. Bd., 456 F.2d 1285 (5th Cir. 1972) (upholding court's finding that basing class assignments on test scores resulted in low black classes and perpetuated classroom segregation and enjoining ability grouping); Simmons v. Hooks, 843 F. Supp. 1296, 1302 (E.D. Ark. 1994) (enjoining use of segregative ability grouping because they were the present result of past discrimination and would not remedy that result).

grouped classes will result also reflects its intent to maintain some degree of class segregation.

For the past several years, Dublin has considered race when assigning students to grade K through 5 classrooms in a manner that has created single race homerooms that remained together all day. This was also true of the middle school classes until this year. This year, all black low classes remain at the middle school, but there are fewer than there were in previous years. Due to the middle school's grouping methods and team structure, students in all black low classes remain segregated for three and sometimes four of their core subjects. See Tab 10 at 6-32; Tab 24. In the elementary schools, the extension classes (i.e., science and social studies) provide an opportunity for integration for students who are in all black classes; however, even many of these classes have no whites because two all black homerooms were paired. See id. at 14, 16, 19-20, 22-23, 28-29, 31-32. These blatant violations of the 1978 Order and well-settled Eleventh Circuit precedent must be stopped.

Dublin attempts to justify its non-compliance and race-based classroom assignment practices on the basis of its fear that white students would otherwise leave the school system. Dublin admitted that it placed all of the white students in second grade in one homeroom at Susie Dasher, which was then a K-2 school, in the 2001-02 year "due to the concern - a concern based on prior experience - that if only three white children were placed in each classroom, the white children would transfer to the primarily white Laurens County school system or to a local private community school, Trinity Christian School." Letter of Apr. 28, 2003, at 5, 8 (admitting same for Saxon Heights) (Tab 25 at 2, 3). Concerns of white flight, however, do not provide Dublin with a legally acceptable justification for implementing policies and practices that perpetuate the vestiges of the dual school system. See United States v. Scotland Neck City Bd. of Educ., 407

U.S. 484, 491 (1972); Stell v. Savannah-Chatham County Bd. of Educ., 888 F.2d 82, 85 (11th Circuit 1989) ("fear of 'white flight' cannot justify delaying desegregation"); United States v. Desoto Parish Sch. Bd. 574 F.2d 804, 816 (5th Cir. 1978) (same); see also Christian v. Board of Educ. of Strong Sch. Dist. No. 83 of Union County, 440 F.2d 608 (8th Cir. 1971). The school district in Christian attempted to do precisely what Dublin has done and proposes to continue doing: intentionally increasing the percentage of white students in certain classrooms, thereby ensuring that the remaining classrooms were all black. See id. at 611. The Eighth Circuit found it "well settled that this kind of pupil assignment constitutes discrimination in the public schools in violation of the Constitution." Id. The United States therefore requests that this Court order relief to ensure full compliance with its 1978 Order and order Dublin to show cause why it should not be held in contempt for its long standing and deliberate violations of the Order.

Conclusion

The United States respectfully asks this Court to enforce the 1971 and 1978 Orders, to order Dublin to show cause why it not be held in contempt for violating the 1978 Order, to enjoin Laurens from accepting transfers that violate the1971 Order, and to order Laurens to verify students' residences.

Respectfully submitted,

PAUL B. MURPHY

United States Attorney
Southern District of Georgia

R. ALEXANDER ACOSTA

Assistant Attorney General

_____

FRANZ R. MARSHALL
EMILY H. McCARTHY
Attorneys
U.S. Department of Justice

Civil Rights Division
Educational Opportunities Section-PHB
950 Pennsylvania Ave., N.W.
Washington, DC 20530
District of Columbia Bar No. 463447
Ph: (202) 514-4092
Fax: (202) 514-8337

DATED: April ____, 2004